84-220

Office-Supreme Court, U.S.
FILED
JUL 6 1984
ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

GERALD CIOLI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL FOR FLORIDA

ALVIN E. ENTIN
ENTIN, SCHWARTZ, DION, & SCLAFANI
Attorneys for Petitioner
ESS Professional Building
1500 Northeast 162nd Street
North Miami Beach, Florida 33162
Telephone: (Dade) (305) 944-6556
(Broward) (305) 921-6556

27pp

QUESTION PRESENTED

WHETHER THE FEDERAL JUDICIARY HAS JURISDICTION TO DETERMINE WHETHER AN INDICTMENT OR INFORMATION IS SO VAGUE AS TO VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

	Page(s)
Questions Presented	i
Table of Citations	iii
Opinion Below	2
Jurisdiction	2
Statement of the Case	3
Statement of the Facts	4
Argument: Issue I	9
Conclusion	18
Appendix	App. 1

TABLE OF CITATIONS

Page(s)

Azrak v. State,
183 So.2d 712 (Fla. 3rd DCA 1966) 16

Callaway v. State,
152 So. 429 (Fla. 1933) 9, 11, 12

Colson v. State,
71 So. 277 (Fla. 1916) 16

Grant v. State,
17 So. 225 (Fla. 1895) 15

Hines v. Baker,
422 F.2d 1002 (1970) 9

Hornsby v. State,
351 So.2d 954, 956 (Fla. 1st DCA 1977) 10

Johnson v. State,
127 So. 317 (Fla. 1930) 9, 10, 11, 12

Mills v. State,
51 So. 278 (1910) 15

Nell v. State,
277 So.2d 1 (Fla. 1973) 16

Raines v. State,
65 So.2d 558 (Fla. 1953) 16

TABLE OF CITATIONS (Continued)

Page(s)

Rosin v. Anderson,
21 So.2d 143 (Fla. 1945) 12

Russell v. United States,
369 U.S. 749, (1962) 14

Sheffield v. State,
90 So.2d 449 (Fla. 1956) 10

State v. Hazellief,
148 So.2d 28 (Fla. 2nd DCA 1962) 12, 13, 14

Streeter v. State,
104 So. 858 (Fla. 1925) 16

United States v. Petrillo,
332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 9

United States v. Simmons,
96 U.S. 360 (1878) 14, 15

Zalla v. State
61 So.2d 649 (Fla. 1952) 16

NO.

in the Supreme Court of the United States

GERALD CIOLI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL FOR FLORIDA

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Third District Court of Appeal for Florida entered in the above-styled case on May 8, 1984.

OPINION BELOW

The opinion of the Third District Court of Appeal for Florida is not reported and is printed in the appendix.

JURISDICTION

The judgment of the Third District Court of Appeal for Florida was entered on May 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT OF THE CASE

On April 19, 1982, Appellant Gerald Cioli was charged in a nine-count Information. Five counts of the Information charged Mr. Cioli and a co-defendant, Nolan Burchill, with various conspiracies in violation of Section 777.04 of the Florida Statutes. The Information also charged Mr. Cioli with two counts of grand theft in violation of Section 812.014 of the Florida Statutes, and with one count of bribery in violation of Section 838.015 of the Florida Statutes. Mr. Cioli was not charged in Count Nine of the Information. Prior to trial, all counts as to Mr. Cioli with the exception of Count Eight regarding the alleged violation of Section 838.015 were either nolle prosquied or dismissed.

On March 30, 1983, non-jury trial commenced against Gerald Cioli. At the close of the State's case, counsel for Appellant renewed his Motion to Dismiss, which motion was denied. Thereafter, Appellant took the stand and testified on his own behalf. At the close of all testimony, the court below took the matter under advisement, and on April 4, 1983, found Appellant guilty of bribery as charged in Count Eight of the Information. A timely motion for arrest of judgment or in the alternative for a new trial was filed and denied. Mr. Cioli was subsequently sentenced to serve a term of three years imprisonment.

Defendant's conviction was affirmed by the Third District Court of Appeal for the State of Florida on May 8, 1984. This Petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

In March, 1982, Richard Krone visited Gerald ("Gerry") Cioli at Gerry Cioli's home. Although they had only had dinner and drinks together a few times, Richard Krone and Gerry Cioli were beginning to become good friends. They had known each other long enough and well enough for Richard ("Richie") to know that Gerry Cioli was having money trouble. During this visit, Richie told Gerry that a friend of his, Nolan Burchill, had been approached by his cousin, a policeman, who was interested in making money by "ripping off" drug dealers.

Because he was in financial trouble, Gerry Cioli decided to discuss this matter with Nolan Burchill's cousin, Carlton Lopez. Richie, acting as a go-between, set up a meeting between Carlton Lopez and Gerry Cioli to take place on March 23, 1982. At Officer Lopez's suggestion, the meeting was to take place at 3:00 p.m. at Moody's Store on Stock Island.

Before this first meeting was to take place, Gerry Cioli had already begun to realize how ridiculous, foolish and dangerous this proposal was. At lunch on March 23rd, he decided he was not going to have any part in this matter, and as a result he did not show up for the scheduled meeting with Officer Lopez. But Officer Lopez and his team comprised of members of the Florida Department of Law Enforcement and the Monroe County Sheriff's Department were anxious to go forward. Undaunted by Gerry Cioli's failure to show at the first scheduled meeting, Lopez sent Richie to Gerry Cioli's home. Richie informed Gerry that Officer Lopez was angry because Cioli had stood him up for the scheduled

three o'clock meeting; Richie informed Gerry that Lopez *insisted* that Gerry meet with him that evening at nine o'clock. Although Gerry Cioli had great reservations about meeting with Officer Lopez, and although he had already failed to make an earlier scheduled meeting with him, he agreed after his conversation with Richie to meet with Officer Lopez that night.

By the time Officer Lopez arrived at Moody's Store, he had already made at least three unsuccessful attempts that day to get together with Gerry Cioli. When Officer Lopez arrived at Moody's Store, he was ready; he was equipped with a monitoring device strapped to his body. After rendezvouing with Gerry Cioli at Moody's Store, Lopez, acting upon instructions from Detective Harry Sawyer of the Monroe County Sheriff's Department, drove Gerry Cioli to a park between U.S. 1 and a Holiday Inn near the Stock Island Bridge. Detective Sawyer was waiting nearby with his listening devices when Officer Lopez and Gerry Cioli arrived.

Although Gerry Cioli had no actual knowledge of the existence of any drug dealers in the area at that time, and although the authorities never found one shred of evidence to show that any such drug dealers, drug money, or drugs existed, Gerry Cioli bragged to Officer Lopez that he could put together a drug deal potentially to be ripped off. In fact, he said many things during that conversation that just were not true in an effort to impress Officer Lopez.

The overall scheme discussed during this first meeting called for Gerry Cioli to plant narcotics in some, as of then unidentified drug dealer's car, which was to be stopped by Officer Lopez, who would find the

drugs and arrest the dealers. While Officer Lopez took these unnamed dealers off to jail, Gerry Cioli and a friend were supposed to break into the drug dealer's car, remove any money in the trunk, and later divide the proceeds so taken with Officer Lopez.

At this first meeting on March 23, 1982, Officer Lopez specifically asked Gerry Cioli for money up front. To this request, Gerry Cioli unequivocably said no, that he had no such money. It was, in fact, Officer Lopez who solicited money up from Gerry Cioli rather than Gerry Cioli making such an offer to Officer Lopez.

Finally, Gerry Cioli suggested that these hypothetical activities take place in a dark and secluded area on Sugarloaf Key. (T. 70). Officer Lopez didn't like this area and suggested Summerland Key instead. Gerry Cioli did not immediately accept this suggestion, but instead merely stated that he would have to check this area out and would let Officer Lopez know. The conversation between Lopez and Gerry Cioli thereafter ended without any definite plans having been made to carry out any illegal acts; instead Officer Lopez was to call Gerry Cioli the following day at 2:00 p.m.

As soon as this meeting was concluded, Gerry Cioli became even more convinced that this entire idea was stupid and just too dangerous; he decided then and there that he wanted no part of it. In fact, the more serious Officer Lopez became, the more reluctant Gerry Cioli became.

The following day, Officer Lopez, on two separate occasions, tried to contact Gerry Cioli to make definite plans to carry out this scheme. The first time Officer

Lopez called Gerry Cioli he was merely informed by Gerry Cioli to call back at 8:00 p.m. When Officer Lopez called back at eight o'clock that evening, Gerry Cioli made arrangements to meet Carlton Lopez the next day to tell him something important. At that point, Gerry Cioli already had decided that he wanted out, but he didn't know how to get out and save face. The following day, Gerry Cioli once again failed to make a scheduled meeting with Carlton Lopez. When Carlton Lopez called, after Gerry Cioli failed to meet him as agreed, Gerry Cioli told him that he had left a message for him at his cousin, Nolan Burchill's home. Although Lopez accused Gerry Cioli of stalling, he said he would talk to his cousin. Approximately one hour later, Lopez called Gerry Cioli again. Although Gerry Cioli was home, he had someone else answer the phone and say that he was not in. But Lopez was so anxious to pursue this matter that instead of waiting for Gerry Cioli to call him back as he had agreed, he, only one-half hour later, called Gerry Cioli again. During this fifth and final call, Lopez convinced Gerry Cioli to meet with him that night. Officer Lopez persisted because he, as well as the other agencies involved in this investigation, knew that at this stage they had no case against Gerry Cioli. Both Lopez and his team knew that Gerry Cioli had not committed any crime. Notwithstanding an airplane in the air and cars on the ground all making surveillance, the investigation never turned up one single scintilla of evidence that either a drug dealer, drugs, or drug money existed. In fact, at trial, Officer Lopez admitted that at that point they had no case.

That evening when at last Carlton Lopez and Gerry Cioli met, Lopez again was wired for sound. This time,

Gerry Cioli flatly stated that he was too reluctant to go further, and that he was just going to mull it over. Notwithstanding Gerry Cioli's reservations and his statement that he was too reluctant to go any further, Lopez, knowing full well that if it ended there that no case existed, continued to urge Gerry Cioli on. At this point, however, Gerry Cioli was terrified of the implications of such a plan; he feared for his life and for the lives of his family. He was even afraid of Lopez at that point. In fact, Officer Lopez knew that Gerry Cioli was scared to death and wanted no part of this proposal. At that point, Gerry Cioli left Officer Lopez's automobile with no further plans to either contact Officer Lopez or to further the proposal previously discussed.

Although everyone involved in the investigation had agreed that no case existed prior to the March 25, 1982 meeting, and although no new evidence or concrete plans were made at that meeting, Gerry Cioli was arrested the very next day and charged in a nine-count Information with conspiracy to traffic in narcotics, conspiracy to commit grand theft in the first degree, conspiracy to commit burglary, theft and bribery. Prior to trial of this cause, all of these counts, with the exception of Count Eight charging Gerry Cioli with bribery, were dismissed.

Based upon the foregoing evidence, Gerry Cioli was tried on one count of bribery and, following a non-jury trial, was convicted as charged and sentenced to three years incarceration.

Upon defendant's conviction being affirmed by the Third District Court of Appeal for the State of Florida, these proceedings seeking a Petition for Writ of Certiorari were instituted.

ARGUMENT

ISSUE I

THE FEDERAL JUDICIARY HAS JURISDICTION TO DETERMINE WHETHER AN INDICTMENT OR INFORMATION IS SO VAGUE AS TO VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

It is generally accepted that the Federal Judiciary has jurisdiction to determine whether an indictment or information is so vague as to violate the due process clause of the United States Constitution. *Hines v. Baker*, 422 F.2d 1002 (1970) and *United States v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877.

It has long been recognized that where a statutory offense is involved, that each and every essential element of the defined offense must be alleged in the charging document in order for a crime to be charged. *Johnson v. State*, 127 So. 317 (Fla. 1930); *see also, Callaway v. State*, 152 So. 429 (Fla. 1933). As early as 1930, the Supreme Court of Florida, in addressing the sufficiency of an Information attempting to charge bribery, recognized:

> The offense [of bribery] is purely statutory, not a common-law offense. If the essential elements of an offense are not alleged in an information or indictment, no offense is charged. *Johnson v. State*, 127 So. 317, 319 (Fla. 1930).

Here, as in *Johnson*, Count Eight of the Information fails to set forth the essential elements of the crime of bribery making a conviction therefor impossible. Section 838.015 (1) of the Florida Statutes expressly defines bribery as:

> "Bribery" means *corruptly* to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or another, any pecuniary or other benefit with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty. *Fla. Stat.*, 838.015(1) (1975). (Emphasis added).

This definition, by its very terms, makes only the "corrupt" giving, offering, or promising of a benefit to a public official a crime. It was therefore incumbent upon the State to allege that Gerry Cioli "corruptly" gave, offered or promised *something* of benefit or of value in violation of Section 838.015. It has long been recognized in this State that:

> When a statute makes the criminality of an act depend on the intent of which it was committed, criminal intent must be alleged in the accusation and proved at trial. *Hornsby v. State*, 351 So.2d 954, 956 (Fla. 1st DCA 1977); *Sheffield v. State*, 90 So.2d 449 (Fla. 1956).

In the instant case, no such criminal intent was alleged. In fact, the Information merely states:

> . . . that [sic] NOLAN F. BURCHILL and GERALD CIOLI, in the County of Monroe and State of Florida, on the 23rd day of March, 1982, in the County and State aforesaid, did then and there give, offer or promise a public servant, to-wit: Deputy Carlton Lopez, an officer of the Monroe County Sheriff's Department, a pecuniary or other benefit, to wit: a bribe, with an intent or purpose to influence the performances or act to wit: effectuating the detention and arrest of persons unknown for violations of the narcotics laws of, the State of Florida, which NOLAN F. BURCHILL and GERALD CIOLI, believed to be in violation of a public duty, contrary to F.S. §838.015.

Even a cursory perusal of this allegation makes it abundantly clear that the requisite corrupt intent was not alleged. The absence of this element alone renders this entire charge a nullity. See *Johnson v. State, supra*, and *Callaway v. State, supra*.

In addition to this fatal defect, the Information also failed to sufficiently allege the crime of bribery in that it failed to state or to describe what thing, if any, of pecuniary or other benefit was given, offered or promised in violation of law. In fact, the Information merely states that Gerry Cioli gave, offered, or promised Deputy Carlton Lopez:

> . . . a pecuniary or other benefit, to-wit: a bribe. . . .

That this statement fails to sufficiently allege one of the essential elements of bribery is without question. As already stated at length, each essential element of a statutory crime must be alleged. *Johnson v. State*, *supra*, and *Callaway v. State*, *supra*. There can be no question that one of the essential elements which must be alleged and proved where attempted bribery is involved is that *something* of pecuniary or other benefit was corruptly given, offered or promised in violation of Section 838.015(1). *Fla. Stat.* §838.015(1) (1975). The mere use of the statutory generic terms: "a pecuniary or other benefit, to-wit: a bribe. . . ." is totally insufficient to satisfy these pleading requirements. The words "pecuniary or other benefit" as contained in Section 838.015 constitute nothing more than generic terms, terms which define a general class or group of things the offer of which constitutes a bribe. Furthermore, the word "bribe" in itself is nothing more than a generic term the mere statement of which also is insufficient to support a charge of bribery.

That the mere use of these generic terms "pecuniary or other benefit, to-wit: a bribe" without naming the item of pecuniary or other benefit — such as money, a house, a car, etc. — was wholly insufficient adequately to allege one of the essential elements of bribery, is demonstrably clear. In fact, the Supreme Court of Florida in *Rosin v. Anderson*, 21 So.2d 143 (Fla. 1945), expressly held that when the statutory definition of an offense includes a generic term, it is not sufficient for the charging document to charge the offense by mere use of the generic term. In fact, not even a bill of particulars can cure this defect. *See, State v. Hazellief*, 148 So.2d 28 (Fla. 2nd DCA 1962).

In *State v. Hazellief, supra*, the Second District Court of Appeal had a situation before it strikingly similar to the one existing here. In *Hazellief*, the defendant had been charged with violations of Sections 838.06 and 838.07 of the Florida Statutes. These sections make it a crime for an officer or official to exact or accept compensation for the performance, nonperformance or violation of any act, rule or regulation that may have been incumbent upon said officer or official to perform.

The Information charging the defendant in *Hazellief* merely alleged in statutory generic terms that on a set time and date, the defendant, a public officer, unlawfully exacted a reward, the sum of Twenty-Five ($25.00) Dollars, "for the performance, non-performance or violation of any act, rule or regulation that might be or was incumbent upon said officer, public appointee or deputy of such officer or public appointee, to administer, respect, perform, execute or to have executed, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida." *State v. Hazellief, supra*, at 29. (Emphasis omitted).

The Second District Court of Appeal in affirming the decision of the court below in quashing the Information stated:

> ...it was incumbent upon the State *to charge the defendants with respect to some particular duty or duties*. Section 838.06, F.S.A., *supra*, makes it unlawful for public officials and appointees or their deputies to exact or accept any reward or compensation other than those provided by law *"for the performance,*

> *nonperformance or violation of any act, rule or regulation"* that may be incumbent upon such persons to administer. The emphasized clause is embodied in the statute and constitutes a necessary element of the crime. *This element, being defined in generic terms, requires specification in the indictment or information of just what act, rule or regulation the defendant is charged with having violated. State v. Hazellief, supra,* at 30. (Emphasis added). (Citation omitted).

Here, as in *Hazellief*, the use of the generic terms "pecuniary or other benefit" and "a bribe" is also insufficient for, as the *Hazellief* court makes clear, the Information must specify just what item or thing of pecuniary or other benefit was promised, offered or given.

The rationale for such specificity is elementary for, as the United States Supreme Court has made clear:

> An indictment was not framed to apprise the defendant "with reasonable certainty, of the nature other accusation against him . . . is defective, although it may follow the language of the statute. *Russell v. United States,* 369 U.S. 749, 769 (1962), quoting *United States v. Simmons,* 96 U.S. 360 (1878).

It is all too obvious that the failure to specify the item or thing which is the subject of the alleged bribe, leaves the defendant open to being charged again and again for the exact same crime. This result is clearly

prohibited. *United States v. Simmons*, 96 U.S. 360 (1978); *Fla.R.Crim.P.* 3.140(o) (1977).

It is consequently clear that the State's failure to specify in the Information what, if any, pecuniary or other benefit was offered, constitutes a fatal defect rendering the Information void and mandates reversal here. *See, Grant v. State*, 17 So. 225 (Fla. 1895); *Mills v. State*, 51 So. 278 (1910).

Finally, the Information was fatally defective for the additional reason that it failed to allege facts which constitute a crime under Section 838.015(1). Section 838.015(1) makes it a crime to corruptly offer, give or promise anything of pecuniary or other benefit to a public servant with the purpose and intent to:

> influence the performance of any act or omission *which the [offeror] believes to be . . . within the official discretion of [the] public servant . . .* *Fla. Stat.* §838.015(1) (1975). (Emphasis added).

This provision obviously makes it a crime to corruptly offer a public official something of value in order to induce that official to do or not to do something which either actually is, or which the offeror *believes to be, within that official's discretion.* In fact, the qualifying language "which the [offeror or promisor] believes to be . . . within the discretion of a public servant" was added to Section 838.015(1) for the obvious purpose of rectifying a longstanding conflict in decisions involving situations where offers were made to public officials to influence the performance of acts which the offeror thought to be, but which in reality were not, within the authority of the official sought to be influenced. *See,*

Nell v. State, 277 So.2d 1 (Fla. 1973); *Raines v. State*, 65 So.2d 558 (Fla. 1953); *Zalla v. State*, 61 So.2d 649 (Fla. 1952); *Streeter v. State*, 104 So. 858 (Fla. 1925); *Colson v. State*, 71 So. 277 (Fla. 1916); and *Azrak v. State*, 183 So.2d 712 (Fla. 3rd DCA 1966). This problem subsequently has been rectified by adding the language "which the person believes to be" which makes it a crime to offer something of value to a public official even where that official does not have the power to act as the offeror desires, so long as the offeror believes that the official has the power or discretion to act as requested.

It is therefore clear that the qualifying term "which the person believes to be" belongs with and qualifies the phrase immediately following it: "within the official discretion of a public servant," and not with next phrase after that "in violation of a public duty . . . ." Yet this misplacement of the qualifier is exactly what count eight of the Information has sought to do by alleging that Gerry Cioli offered a benefit to Officer Lopez:

> . . . with an intent or purpose to influence the performances or act, to-wit: effectuating the detention and arrest of persons unknown for violations of the narcotics laws of the State of Florida, which NOLAN F. BURCHILL and GERALD CIOLI, *believed to be in violation of a public duty*, contrary to F.S. §838.015. (R. 12). (Emphasis added).

This allegation clearly states that Gary Cioli believed that the arrest of persons for violations of the narcotics laws was a violation of a public duty. Whether or not Gerry Cioli believed that the arrest of persons for

violations of the narcotics laws was in violation of a public duty is just not germane to a prosecution under §838.015(1), for Section 838.015 (1) makes it a crime to offer a bribe for the purpose of influencing an act which *is* a violation of a public duty, not which the offeror merely *believes to be* in violation of a public duty. *Fla. Stat.* §838.015(1) (1975).

In the instant case, the State has attempted to charge Gerry Cioli with attempting to influence the performance or an act by a public official "in violation of a public duty," yet the specific act which the Information details as being violative of a public duty; i.e., "the detention and arrest of persons unknown for violations of the narcotics laws . . . ." obviously is not a violation of any public duty, but is actually Officer Lopez's job. In essence, the Information first alleges facts that show that Gerry Cioli merely sought to have Officer Lopez do his job, then second, in complete contradiction to the plain meaning of these allegations, the Information concludes that these actions constitute a violation of a public duty. That these allegations are insufficient to satisfy the requirements of §838.015(1) so as to allege the crime of bribery, is clear. In the absence of any allegations to show the request for the performance of some act which is a violation of a public duty, this Information must fail.

It is consequently clear that the failure of the Information involved here to allege the essential element of corrupt intent, combined with its failure not only to specify what "thing" or "item" of pecuniary or other benefit was offered but also to state what act was sought to be influenced inviolation of a public duty, renders it fatally defective and mandates a reversal here.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its order quashing the decision hereby sought to be reviewed, and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

ALVIN E. ENTIN
ENTIN, SCHWARTZ, DION,
& SCLAFANI
Attorneys for Petitioner
ESS Professional Building
1500 Northeast 162nd Street
North Miami Beach, Florida 33162
Telephone: (Dade) (305) 944-6556
(Broward) (305) 921-6556

Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1984

CASE NO. 83-1097

GERALD CIOLI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed May 8, 1984.

An Appeal from the Circuit Court for Monroe County, Bill G. Chappel, Judge.

Fine, Jacobson, Block, Klein, Colan & Simon and Linda Ann Wells, for appellant.

Jim Smith, Attorney General and Randi B. Klayman, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J. and NESBITT and BASKIN, JJ.

PER CURIAM.

Affirmed. *Zalla v. State*, 61 So.2d 649 (Fla. 1952); *Whitman v. State*, 97 Fla. 988, 122 So. 567 (1920); *State v. Saad*, 429 So.2d 757 (Fla. 3d DCA 1983); *Jones v. State*, 415 So.2d 852 (Fla. 5th DCA 1982), rev. denied, 424 So.2d 761 (Fla. 1982); *State v. Fields*, 390 So.2d 129 (Fla. 4th DCA 1980); *Trushin v. State*, 384 So.2d 668, 676, 678 (Fla. 3d DCA 1980), aff'd, 425 So.2d 1126 (Fla. 1982); *State v. Newton*, 328 So.2d 110 (La. 1976).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this __ day of July, 1984.

ALVIN E. ENTIN
ENTIN, SCHWARTZ, DION
& SCLAFANI
Attorneys for Petitioner
ESS Professional Building
1500 Northeast 162nd Street
North Miami Beach, Florida 33162
Telephone: (Dade) (305) 944-6556
(Broward) (305) 921-6556